

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 DANIEL W. DANCER,

11 Plaintiff,

12 v.

13 JON JESKE, *et al.*,

14 Defendant.

Case No. C09-5153 BHS/KLS

ORDER TO SHOW CAUSE

15 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. §
16 636(b)(1), and Local Rules MJR 3 and 4. The case is before the Court for review of Plaintiff's complaint.
17 After reviewing the Complaint and balance of the record, the Court finds and orders as follows:

18 A complaint is frivolous when it has no arguable basis in law or fact. *Franklin v. Murphy*, 745
19 F.2d 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a
20 complete defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before
21 service of process under 28 U.S.C. § 1915(d). *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (*citing*
22 *Franklin v. Murphy*, 745 F.2d 1221, 1227 (9th Cir. 1984)).

23 Although complaints are to be liberally construed in a plaintiff's favor, conclusory allegations of
24 the law, unsupported conclusions, and unwarranted inferences need not be accepted as true. *Id.* While the
25 court can liberally construe plaintiff's complaint, it cannot supply an essential fact an inmate has failed to
26 plead. *Pena*, 976 F.2d at 471 (*quoting Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th
27 Cir. 1982)).

28 To state a claim under 42 U.S.C. § 1983, a complaint must allege that the conduct complained of

1 was committed by a person acting under color of state law and that the conduct deprived a person of a
2 right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*,
3 451 U.S. 527, 535 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Section
4 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present.
5 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

6 A plaintiff must also allege facts showing how individually named defendants caused or
7 personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d 1350, 1355
8 (9th Cir. 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of
9 supervisory responsibility or position. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658,
10 694 n.58 (1978). A theory of *respondeat superior* is not sufficient to state a § 1983 claim. *Padway v.*
11 *Palches*, 665 F.2d 965 (9th Cir. 1982).

12 Plaintiff alleges that in November 2001, Jon Jeske of the Washington State Department of Fish
13 and Wildlife prepared a false report, which resulted in his prosecution for unlawful hunting of elk in the
14 Lewis County District Court. He alleges that in July 2007, Jon Jeske found Plaintiff trespassing and drew
15 his weapon on him. On August 28, 2007, Plaintiff alleges that John Jeske wrongfully issued him eight
16 tickets. Dkt. # 1-2, p. 3.

17 Plaintiff asks the Court to have all charges that were brought against him “expunged” from his
18 record, for an injunction prohibiting this type of abuse by Department of Fish and Wildlife Officers, for a
19 public apology from the Chief of the Department of Fish and Wildlife for the slander and for employing
20 this type of officer, and for statutory and punitive damages of \$377,000.00 for legal fees, fines and pain
21 and suffering. Dkt. # 1-2, pp. 4-5.

22 After review of Plaintiff’s allegations, the Court finds that Plaintiff has failed to claim a violation
23 of his constitutional rights.

24 It is unclear from the Plaintiff’s complaint whether he is calling into question the validity of his
25 current incarceration. To the extent that he is and he requests that the charges against him be “expunged,”
26 and that he be awarded money damages, it appears that a writ of habeas corpus may be Plaintiff’s
27 exclusive remedy. In order to recover damages for an alleged unconstitutional conviction or
28 imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or

1 sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct
2 appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such
3 determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. §
4 2254. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). A claim for damages bearing that relationship
5 to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. *Id.*

6 Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider
7 whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or
8 sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the
9 conviction or sentence has already been invalidated. *Id.* If the court concludes that the challenge would
10 necessarily imply the invalidity of the judgment or continuing confinement, then the challenge must be
11 brought as a petition for a writ of habeas corpus, not under § 1983.” *Butterfield v. Bail*, 120 F.3d 1023,
12 1024 (9th Cir.1997) (quoting *Edwards v. Balisok*, 520 U.S. 641 (1997)).

13 In this case, Plaintiff seeks \$377,000 in “statutory” and punitive damages for the “abuse of power”
14 he claims he suffered at the hands of the Department of Fish and Wildlife officer. Dkt. # 1-2, p. 3.
15 However, there is no allegation that the conviction or sentence of which Plaintiff complains has been
16 reversed on direct appeal, expunged by executive order, or declared invalid by a state tribunal. Thus,
17 Plaintiff shall not be permitted to seek monetary damages or pursue such claims via section 1983 without
18 first successfully petitioning for his release and/or expungement of his sentence or conviction imposed by
19 the state trial court.

20 To the extent Plaintiff's allegations do not implicate his current incarceration, Plaintiff is advised
21 that the general rule is that a malicious prosecution claim is not cognizable under §1983 if process is
22 available in the state judicial system to provide a remedy. *Usher v. City of Los Angeles*, 828 F.2d 556, 561
23 (9th Cir.1987). Nonetheless, “an exception exists to the general rule when a malicious prosecution is
24 conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to
25 subject a person to a denial of constitutional rights.” *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir.1985)
26 (en banc). Thus, a malicious prosecution plaintiff “must show that the defendants prosecuted him with
27 malice and without probable cause, and that they did so for the purpose of denying him equal protection
28 or another specific constitutional right.” *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th

1 Cir.1995).

2 Plaintiff is also advised that under 42 U.S.C. § 1983, claims can only be brought against people
3 who personally participated in causing the alleged deprivation of a constitutional right. *Arnold v. IBM*,
4 637 F.2d 1350, 1355 (9th Cir. 1981). Neither a State nor its officials acting in their official capacities are
5 “persons” under section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). “Jane Doe”
6 Jeske and “the Estate” of Jon and Jane Doe Jeske are not “persons” under section 1983. “Washington
7 State Department of Fish and Wildlife” is also not a “person” under section 1983.

8 Plaintiff names the Washington State Department of Fish and Wildlife as a defendant, but fails to
9 allege facts or name specific individuals to support any claim of constitutional harm. This is not
10 sufficient to state a claim under 42 U.S.C. § 1983. Plaintiff must set forth facts describing when and
11 where and by whom he was deprived of a constitutional right. Plaintiff’s Complaint must include factual
12 allegations describing how each individual caused or personally participated in causing him the harm that
13 he claims he suffered. In addition, Plaintiff must name the individuals who are responsible for causing
14 him harm. It is not sufficient to merely name individuals in supervisory positions. He must name the
15 individual defendants who violated his federal rights and he must allege facts showing how individually
16 named defendants caused or personally participated in causing the harm alleged in the complaint. *Arnold*
17 *v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A defendant cannot be held liable under 42 U.S.C. § 1983
18 solely on the basis of supervisory responsibility or position. *Monell v. New York City Dept. of Social*
19 *Services*, 436 U.S. 658, 694 n.58 (1978). A theory of *respondeat superior* is not sufficient to state a §
20 1983 claim. *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982).

21 In addition, “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison or
22 other correctional facility, for mental or emotional injury suffered while in custody without a prior
23 showing of physical injury.” 42 U.S.C. § 1997e(e); *see also* 28 U.S.C. § 1346(b)(2) (similar provision
24 added to the Federal Tort Claims Act). This provision “requires a showing of physical injury that need
25 not be significant but must be more than *de minimus*.” *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002).

26 Here, Plaintiff seeks \$377,000.00 in statutory and punitive damages for “legal fees, fines and pain
27 and suffering.” Dkt. # 1-2, pp. 4-5. However, he alleges no physical injury.

28 Due to the deficiencies described above, the court will not serve the complaint. Plaintiff must

1 show cause explaining why this matter should not be dismissed or, alternatively, he may file an amended
2 complaint curing, if possible, the above noted deficiencies. Plaintiff must show cause or file the amended
3 complaint **no later than May 29, 2009**. If Plaintiff files an amended complaint under § 1983, the
4 amended complaint shall consist of a **short and plain statement** showing that he is entitled to relief.
5 Plaintiff shall allege with specificity the following:

- 6 (1) the names of the persons who caused or personally participated in causing the
7 alleged deprivation of his constitutional rights;
- 8 (2) The dates on which the conduct of each Defendant allegedly took place; and
- 9 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

10 Plaintiff shall set forth his factual allegations in separately numbered paragraphs and shall attach
11 only those exhibits relevant to the factual allegations contained within the amended complaint.

12 Plaintiff is further advised that this amended pleading will operate as a complete substitute for
13 (rather than a mere supplement to) the present complaint. Plaintiff shall present his complaint on the form
14 provided by the Court. The amended complaint must be legibly rewritten or retyped in its entirety, it
15 should be an original and not a copy, it may not incorporate any part of the original complaint by
16 reference, and **it must be clearly labeled the "First Amended Complaint" and Cause Number C09-**
17 **5153 BHS/KLS must be written in the caption**. Additionally, Plaintiff must submit a copy of the "First
18 Amended Complaint" for service on each named Defendant.

19 **Plaintiff is cautioned that if he fails to show cause or amend his complaint by May 29, 2009,**
20 **the Court will recommend dismissal of this action as frivolous pursuant to 28 U.S.C. § 1915 and**
21 **such dismissal will count as a "strike" under 28 U.S.C. § 1915(g).**

22 The Clerk is directed to send Plaintiff the appropriate forms that he may file an amended
23 complaint. The Clerk is further directed to send a copy of this Order and a copy of the General Order to
24 Plaintiff.

25 Dated this 4th day of May, 2009.

26 

27 Karen L. Strombom
28 United States Magistrate Judge